

FILE COPY

In the Supreme Court of the United States

D. T. CUMMINS, Plaintiff,
Doan Edmundson, Defendant.
Ford Norton, Intervenor.

HENRY A. WALLACE, Secretary of Agriculture,
New York, Intervenor.

ON PETITION FOR WRIT OF HABEAS CORPUS, AND
STATES OF NEW YORK, IN THE SECOND
CIRCUIT.

RECORDED IN THE OFFICE OF THE CLERK OF THE COURT

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 275

D. T. CURRIN, S. M. CUTTS, AND H. A. AVERETT,
DOING BUSINESS AS FLEMING WAREHOUSE, OXFORD,
NORTH CAROLINA, ET AL.

v.

HENRY A. WALLACE, SECRETARY OF AGRICULTURE
FOR THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Circuit Court of Appeals, reversing the District Court, held constitutional the Tobacco Inspection Act of August 23, 1935, 7 U. S. C. A. 511 *et seq.*, c. 623, 49 Stat. 731-735.¹

That Act provides, in summary, for the inspection and grading, by Government graders, before

¹The opinion of the District Court is not reported but appears in the record, p. 34. The opinion of the Circuit Court of Appeals appears in the record, p. 383, and is reported in 95 F. (2d), p. 856.

sale, of tobacco offered for sale by warehousemen as tobacco auctioneers. The great preponderance of all tobacco produced in the United States is sold in this manner. The Act provides for designation by the Secretary of the markets where tobacco bought and sold, or the products thereof, move in interstate commerce and makes the Act applicable to the markets so designated. It provides that before the Secretary may designate a market as subject to the provisions of the Act a referendum shall be held among the growers who sold tobacco on that market during the preceding marketing year and provides that no market shall be so designated unless two-thirds of such growers voting favor the establishment of the inspection service. The Act provides that if sufficient inspectors are not available, or if for other reasons, the Secretary is unable to provide for inspection and grading of tobacco at all markets within an area, he shall first designate those markets where the greatest number of growers may be served with available facilities. The Act provides for public notice that a market has been designated by the Secretary and provides that no tobacco shall be offered for sale at any market so designated until the tobacco shall have been inspected and certified by the Secretary's representative. It makes violation of the latter provision a misdemeanor and provides for a fine or imprisonment or both in case of a violation.

Pursuant to the Act the Secretary designated the market upon which the warehouses operated by the

petitioners are located. The petitioners sought to have the Act declared unconstitutional and to enjoin its application to their warehouses.

The District Court granted a temporary restraining order and, after hearing, a permanent injunction. The Circuit Court of Appeals reversed, holding (1) that although the petitioners had failed to show that substantial damage would fall upon them through compliance with the Act, they were entitled nevertheless to maintain the suit and, if the court were of the opinion that the Act is unconstitutional, to injunctive relief; (2) that the Act is a proper exercise of the power of Congress to regulate interstate commerce and is not an invasion of the reserved powers of the states; (3) that there was no unlawful delegation of power either to the Secretary of Agriculture or to the growers; and (4) that the Act does not deprive the petitioners of property without due process of law.

Although we believe that the result reached by the court below was correct we do not feel justified in opposing the granting of a writ of certiorari, in view of the importance of the questions concerning the constitutionality of the Act which were decided by that court.

We believe it desirable to point out, however, that, if certiorari should be granted, the Government intends to reassert the defense that the petitioners, having failed to show that they were threatened with any damage if they should comply with the Act, are not entitled to attack its

constitutionality. The record discloses that if they had complied with the Act in all likelihood they would have been benefited rather than injured.

If this Court should decide that the court below erred in rejecting this defense it would be unnecessary for it to pass upon the constitutional questions considered by the court below.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SEPTEMBER 1938.